IN THE HIGH COURT OF BOMBAY AT GOA.

SECOND APPEAL NO. 51 OF 2000.

1. Shri Pundalik P. Raikar,
2. Shri Balaji Shanku Kenkre,
both r/o Vassuvaddo,
Benaulim, Goa. ... Appellants.

Versus

1. Smt. Ana Clara Vaz
(since deceased).
2. Shri Anthony D'Souza
and his wife
3. Smt. Florinda D'Souza,
r/o Pulvaddo, Benaulim,
Goa.
4. Shri Aniceto Rodrigues.
5. Shri Pedro Faria.
6. Smt. Maria Francisca
Fernandes (since deceased
by legal heirs):
a) Smt. Jacinta Pereira
r/o Majilwado, Benaulim,
Goa.
7. Smt. Conceicao Maria
Pereira and
8. Shri Santano Rebello,
r/o Mazilwaddo, Benaulim,
Goa. ... Respondents.

Mr. A.F. Diniz, Advocate for the Appellants.

Mr. C.a. Coutinho, Advocate for the Respondents 2 and 3.

Coram : P.V. HARDAS, J.

Date : 17th March 2004.

ORAL JUDGMENT.

This Second Appeal was admitted by this Court on the following grounds:-

> "1. Whether the Courts below could have decreed the suit filed by the respondents seeking a declaration of title and injunction when both the Courts below have themselves found that the half share in the property "Vanvolichem Manda Santanoilem

Gorachem Gormanda" alias "Novelem" bearing Land Registration No. 3731 and Matriz No. 1064 had been purchased by Fondu Vishnu Raikar in public auction conducted by the Court on 11th January 1940 and was gifted to the "Satiomati Samaj" by Gift Deed dated 2nd June 1950 and accordingly as the suit property is the Southern half of the said entire property, the necessary consequence would be that the said Samaj was half sharer in the entire property including the suit property and accordingly declaration of title or injunction as sought for by the respondents 1, 2 and 3 could not be granted?

3. Whether the trial Court could have held that the respondent no. 1 had acquired title by prescription to the other half, i.e. half which belonged to her brother and was auctioned to the said Raikar and gifted to the said Samaj, when no plea of prescription was specifically taken as mandated by Article 515 of the Portuguese Civil Code nor were the ingredients of prescription either pleaded by the respondents 1, 2 and 3 or proved?

6. Whether the Courts below ought not to have applied the presumption raised by Section 105 of Land Revenue Code since the survey record of Survey No. 414/7 which pertains to the suit property showed the deity Goddess Laxmi as the occupant thereof and the respondents 1, 2 and 3 had not disputed that the said Samaj is formed by the deity of the temple of Goddess Laxmi which plea was taken in the written statement and also categorically asserted by DW1 in his deposition which statement was not challenged/denied by respondents 1, 2 and 3?

2. This Appeal is filed against the Judgment and Decree of the Civil Judge, Senior Division, at Margao, dated 17th January 1986, in Regular Civil Suit No. 202/1977/C/A, decreeing the suit of the

respondents/plaintiffs, confirmed by the Judgment and Decree of the Additional District and Sessions Judge, South Goa, Margao, dated 30th July 1998, in Regular Civil Appeal No. 5/1986/I.

3. The facts in brief, as are necessary for the decision of the Appeal, are set out hereunder:-

Undisputedly the suit property known as "Vanvolichem Manda Santanoilem Gorachem Gormanda" alias "Novelem" is registered in the Land Registration Office under No. 3731 and enrolled in the Land Revenue Office under No. 1064. Undisputedly also as per the certificate of the Land Registration Office at Exhibit P.1, half of the said property stands in the name of plaintiff no. 1 and the other half in the name of Fredrico Assumcao Vaz, who, admittedly, was the brother of plaintiff no. 1. Half of the property standing in the name of Fredrico Assumcao Vaz was attached and sold in public auction on 11th January 1940 and the said half share of Fredrico Assumcao Vaz was purchased by one Fondu Vishnu Raikar in a public auction. The said Fondu Vishnu Raikar and his wife, on 2nd June 1950, gifted the property in favour of "Satiomati Samaj" of Benaulim. The plaintiffs filed a suit claiming therein that the plaintiffs may be declared as owners in possession of the suit property described in paragraphs 2 and 3. The

plaintiffs further claimed for grant of injunction permanently restraining the defendants, their agents, servants, relatives and labourers from interfering and entering upon the suit property which was shown in the suit map. Undisputedly the description of the property in paragraphs 2 and 3 of the plaint is not restricted to the half share of the plaintiffs but relates to the entire property of which, admittedly, the plaintiff no. 1 had only half share. The learned trial Court on the basis of the pleadings of the parties framed the following issues:-

> "1. Whether the plaintiffs prove that they are the owners in possession of the suit property?
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> 2. Whether the plaintiffs prove that they have been in peaceful, open and lawful possession of the suit property for the last over 50 years?
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> 3. Whether the plaintiffs prove that the defendant nos. 1 and 2 wrongfully entered into the southern side portion of the suit property and plucked several coconut trees without any right in order to dispossess the plaintiffs?
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> 4. Whether the plaintiffs prove that the defendant no. 3 has obstructed them from plucking the trees in the suit property?
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> 5. Whether the plaintiffs prove that in the month of July 1977 the defendant nos. 1 and 2 have manured the coconut trees standing on the southern side portion of the suit property?
>
> 5-A. Whether the plaintiffs prove that the defendant nos. 1 and 2 have

caused damage to the plaintiffs by cutting down live trees existing in the suit property?

5-B. Whether the plaintiffs prove that the defendant nos. 1 and 2 have turned the private well of the plaintiffs into a public well?

5-C. Whether the plaintiffs prove that the defendant no. 3 has been causing damage to the property by intentionally allowing their cattle to pass through it?

6. Whether the defendant nos. 1 and 2 prove that the suit property was purchased by one Fondu Vishnu Raikar in the Court auction held in the year 1940 and thereafter he handed over the possession of the same to Satiomati Samaj which began to enjoy the same consequent upon the gift deed dated 2nd June 1950 made in their favour by the said Raikar and his wife?

7. Whether the defendants prove that the defendant no. 1 was the Secretary of the said Samaj during the period 1974 to 1976 and the defendant no. 2 is the President of that Samaj since 1977 and in that capacity they have been managing the suit property?

8. Whether the defendant no. 3 proves that the suit property has been in open, lawful and peaceful possession and ownership of the mother-in-law of the defendant no. 3 during her life time and after her death, of the defendant no. 3 and her son Manuel Fernandes?

9. To what relief if any are the plaintiffs entitled to?"

4. In the present appeal, the appellants/original defendants 1 and 2 are primarily concerned with the finding recorded by the Court in respect of issue no. 6. The trial Court in its Judgment, at paragraph 10 found that in the year 1950 Fondu Vishnu Raikar had

gifted the half share purchased in auction to "Satiomati Samaj". The learned trial Court also found that the document produced in evidence clearly shows that the property registered in the Land Registration Office under No. 3731 and enrolled in the Land Revenue Office under No. 1061 was never partitioned between the original owners, that is, the plaintiff no. 1 and the predecessor in title of Fondu Vishnu Raikar. On the basis of the fact that the said property had not been partitioned, the learned Judge recorded a finding that the transaction of public auction was just a paper transaction and Fondu Vishnu Raikar and, thereafter, the "Satiomati Samaj" never took effective possession of the said half share of the property except in the year 1977 when they tried to take possession of the southern portion of the property. The learned trial Court, accordingly, decreed the suit of the plaintiffs.

5. On an appeal being carried to the appellate Court by the appellants/original defendants 1 and 2, the appellate Court endorsed the findings of the learned trial Court and dismissed the appeal, thereby confirming the Judgment and Decree of the learned trial Court.

6. Mr. Diniz, the learned counsel appearing on behalf of the appellants, has urged before me that the findings of the learned trial Court that the purchase of

the property by Fondu Vishnu Raikar and, thereafter, gifting of the property to the said Samaj was a paper transaction, is a finding which is not based on any legal evidence. According to him, the plaintiffs had also not set up a case to that effect. There is nothing on record to show that the auction and the purchase of the half share in public auction by Fondu Vishnu Raikar was a nullity. In any event, no challenge was set up by the plaintiffs in respect of the title of Fondu Vishnu Raikar and, thereafter, the Satiomati Samaj in respect of half undivided share in the property. Thus, according to him, undisputedly Fondu Vishnu Raikar was an auction purchaser who had purchased the half undivided share of the brother of the plaintiff no. 1 and had subsequently gifted his share to the Samaj and, therefore, the plaintiff no. 1 cannot be said to be the owner of the entire suit property. He has also urged that in this set of circumstances, the Samaj was a necessary party before the suit for declaration could have been decreed by the trial Court.

7. Mr. Coutinho, the learned counsel appearing on behalf of the respondents 2 and 3/original plaintiffs, has tried to support the Judgment of the two Courts below.

8. Admittedly, the plaintiffs had not raised any

challenge to the title of Fondu Vishnu Raikar and the subsequent title passed on to the Samaj. There was no challenge in the suit that the proceedings in the auction were either sham or bogus. Merely because the property had not been partitioned, it cannot be a ground to hold that the transaction was only a paper transaction. Since there was no pleading to that effect, no issue had been framed by the Court whether the purchase of the property in auction by Fondu Vishnu Raikar was a paper transaction. The finding of the learned trial Court in this behalf, therefore, is wholly unsustainable.

9. If, admittedly, the plaintiff no. 1 was not the owner of the entire property, but, was the owner of only half undivided share in the suit property, the suit could not have been decreed declaring her to be the owner of the whole property. If the suit could not have been decreed in respect of the declaration sought by the plaintiffs, the relief of permanent injunction is also unsustainable.

10. I have given my anxious consideration to the rival submissions and I am of the opinion that the Samaj was the owner of the half share gifted to it by Fondu Vishnu Raikar, who had purchased the same in auction. Admittedly, the plaintiff no. 1 was not the sole owner

of the entire property and, as such, the Courts could not have decreed the suit by declaring the plaintiff no. 1 to be the owner of the entire property. The finding of the learned trial Court in respect of issue no. 2 that the property purchased by Fondu Vishnu Raikar in the public auction was a 'paper transaction' is a finding which is not based on material on record and is also a finding which is not based on any challenge raised in the suit. The said finding is, therefore, unsustainable. If that be the position, the trial Court could not have decreed the suit of the plaintiffs and if the trial Court could not have decreed the suit of the plaintiffs by granting the decree of declaration, the relief of permanent injunction also cannot stand.

11. In the result, therefore, the Second Appeal is allowed. The Judgments and Decrees passed by the two Courts below are, hereby, quashed and set aside and the suit of the plaintiffs is dismissed with no order as to costs.

(P.V. HARDAS)
JUDGE.

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